90-1880

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
VOLUME IV

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APPENDIX O

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

No. 681 C 1980

BEFORE: Gilfert M. Mihalich, J.
Joseph A. Hudock, J.
Daniel J. Ackerman, J.

COURT EN BANC

O P I N I O N

(Opinion by Gilfert M. Mihalich, J.)

In the above-captioned case, the Defendant, John Charles Lesko, was tried before a jury on charges of Criminal Homicide and Criminal Conspiracy to Commit Criminal Homicide. The Defendant was found guilty of murder in the first degree and criminal conspiracy. The jury imposed a death sentence on the

first degree murder conviction.

Defendant's counsel filed a "Motion for New Trial" setting forth fifty reasons. Counsel for the Defendant addressed thirteen of these reasons in his brief and in his oral argument. This Court will address these thirteen reasons.

Defendant's counsel also filed a "Motion in Arrest of Judgment" and a brief wherein it is alleged that the charges should be dismissed because of a violation of Rule 1100.

The reasons for requesting a new trial addressed by Defendant's brief and argued before this Court en Banc are as follows:

I. DURING THE PENALTY PHASE OF THE PROCEEDINGS, THE ASSISTANT DISTRICT ATTORNEY PRESENTED INFLAMMATORY ARGUMENT TO THE JURY. (Page 5 of this Opinion)

II. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE VENIREMEN OPPOSED TO THE DEATH PENALTY WERE EXCLUDED FOR CAUSE IN VIOLATION OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968). (Page 9 of this Opinion)

III. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA. C.S.A. §1311 IS IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION. (Page 21 of this Opinion)

IV. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA.C.S.A § 1131 IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION IN THAT IT PLACES THE

BURDEN OF PROVING MITIGATING CIRCUMSTANCES UPON THE DEFENDANT. (Page 25 of this Opinion)

V. EXCLUSIVE FOR CAUSE OF VENIREMEN WHO STATED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE STATE AND FEDERAL CONSTITUTION. (Page 28 of this Opinion)

VI. EXCLUSION FOR CAUSE OF VENIREMEN WHO STATED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED APPELLANT'S RIGHT TO JURY TRIAL WHICH IS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION. (Page 28 of this Opinion)

VII. THE COURE ERRED IN PERMITTING THE COMMONWEALTH TO INTRODUCE AS AN AGGRAVATING CIRCUMSTANCE FOR SENTENCING, EVIDENCE THAT JOHN LESKO HAD ENTERED A PLEA OF GUILTY IN THE COURT OF COMMON PLEAS OF INDIANA COUNTY TO THE "SECOND DEGREE MURDER" OF WILLIAM NICHOLS, BECAUSE THAT PLEA WAS NOT A "CONVICTION," AS REQUIRED BY THE SENTENCING CODE. (Page 32 of this Opinion)

VIII. THE DEFENDANT WAS SUBJECTED TO AN ILLEGAL ARREST BY PITTSBURGH POLICE, AND DE- FENDANT'S REQUEST FOR SUP- PRESSION OF EVIDENCE SHOULD HAVE BEEN GRANTED. (Page 34 of this Opinion)

IX. THE "MIRANDA WARNING" ADMINISTERED TO THE DEFENDANT BY PITTSBURGH POLICE WAS INADEQUATE UNDER THE LAW BECAUSE THE DEFENDANT WAS NOT ADVISED THAT HE WAS A SUSPECT IN THE CRIMINAL HOMICIDE OF LEONARD CLIFFORD MILLER, AND THE USE OF THE CONFESSION AS EVIDENCE AT TRIAL VIOLATED THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT. (Page 43 of this Opinion)

X. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AFTER THE COURT SUBMITTED ITS INSTRUCTIONS TO THE JURY CONCERNING THE CHARGE OF CRIMINAL CONSPIRACY TO COMMIT MURDER. (Page 45 of this Opinion)

XI. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S OBJECTIONS, THE IDENTIFICATION TESTIMONY OF JAMES HENDERSON, WHICH EVIDENCE SHOULD HAVE BEEN SUPPRESSED FOR THE REASONS SET FORTH IN THE SUPPLEMENTAL MOTION TO SUPPRESS AND AT THE SUPPRESSION HEARING, THE IDENTIFICATION HAVING BEEN OBTAINED BY LAW ENFORCEMENT OFFICIALS IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION. (Page 50 of this Opinion)

XII. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S POINTS FOR CHARGE BY WHICH THE JURY WOULD HAVE BEEN ADVISED THAT IT COULD FIND JOHN LESKO GUILTY OF A DIFFERENT DEGREE OF MURDER

THAN THE JURY MIGHT RETURN FOR MICHAEL TRAVAGLIA. (Page 54 of this Opinion)

XIII. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S OBJECTIONS, THE TESTIMONY OF RICKY RUTHERFORD, CONSISTING OF LEWD AND GRUESOME ACTS ON THE PART OF THE DEFENDANTS TOWARD WILLIAM NICHOLS PRIOR TO THE ALLEGED KILLING OF LEONARD CLIFFORD MILLER, WHICH EVIDENCE COMPRISED A SEPARATE AND ISOLATED EPISODE, TRANSACTION AND OCCURRENCE, AND INFLAMED THE PASSIONS OF JURY AGAINST THE DEFENDANT. (Page 55 of this Opinion)

* * * * *

I. DURING THE PENALTY PHASE OF THE PROCEEDINGS, THE ASSISTANT DISTRICT ATTORNEY PRESENTED INFLAMMATORY ARGUMENT TO THE JURY. (Defendant's first reason why a new trial should be granted.)

The alleged objectionable remarks by the Assistant District Attorney are as follows:

> "So I'll say this: show them sympathy. If you feel that way, be sympathetic, Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No. more. No. more.
>
> "I want you to remember this: We have death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty." (N.T. 1701-1702)

In evaluating the Defendant's objections to these remarks by the Assistant District Attorney, we must keep in mind

two important facts. The first is that these comments were made in the penalty phase of the trial; the jury had already decided that Mr. Lesko was guilty of Murder in the First Degree. Secondly, the function of the jury in this penalty phase of the trial is to determine the existence of aggravating or mitigating circumstances; and in accordance with the law, as outlined by the trial judge, to determine whether this Defendant's sentence shall be death or life imprisonment. Sympathy is not one of the aggravating or mitigating circumstances; however, counsel for Defendant-Lesko chose to interject the aspects of sympathy and alleged historical reasons for refuting the entire concept of a death penalty. He opened the door and the Assistant District Attorney delicately walked through this door. The Assistant District Attorney has a

right to try and remove from the jury's mind that which has been improperly implanted by defense counsel. (It is proper for prosecutor to respond to arguments advanced by defense counsel. Comm. v. Parente, 440 A.2d 549, 553 [1982]). In such circumstances, the Assistant District Attorney's effort must be limited to a reasonable response to the defense counsel's extrinsic evidence and comments. A review of the defense counsel's extrinsic evidence and comments will reveal that the Assistant District Attorney's comments were reasonable responses. These remarks did not hinder an objective weighing of the aggravating and mitigating circumstances, nor did they impede the rendering of a proper penalty under the circumstances.

Let us review some of the extrinsic evidence and comments interjected by de-

fense counsel. The Defendant, the mother of the Defendant and other relatives testified to his unfortunate and sympathetic childhood, i.e., abandonment by the mother, residence in orphanages, the fact that once some kids set fire to the Defendant. In his closing, defense counsel alluded to the historical development or underdevelopment of the death penalty. He contended that the death penalty had no beneficial effect on society and urged the jury not to impose the death penalty.

This evidence and argument by defense counsel went far beyond the purpose and scope of the penalty phase of the trial. It was calculated to inflame the sympathy of the jury and divert them from their assigned task of evaluating and balancing the aggravating and mitigating circumstances. It was designed to convince the jury that there is no

societal benefit or purpose in the imposition of a death penalty. In response, the Assistant District Attorney merely told the jury that they should temper the sympathy suggested by defense counsel's evidence and comments and told the jury that the imposition of the death sentence may have some societal purpose and benefit.

In looking at an overall perspective of all the closing arguments and the court instructions and considering that the above-quoted remarks of the Assistant District Attorney were responsive to issues interjected by defense counsel, this Court finds:

a. the remarks by the Assistant District Attorney did not hinder an objective weighing of the aggravating and mitigating circumstances, and

b. these remarks did not impede the rendering of a proper penalty under the circumstances.

For the above-mentioned reasons, the Defendant's first reason for a new trial does not warrant the granting of a new trial and is dismissed.

II. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE VENIREMEN OPPOSED TO THE DEATH PENALTY WERE EXCLUDED FOR CAUSE IN VIOLATION OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968). (This is Defendant's second reason for a new trial.)

There is no question that the trial judge exerted every reasonable effort to empanel a fair and impartial jury within constitutional parameters including Witherspoon v. Illinois, supra. The trial judge made three separate efforts to select a fair, impartial jury. On

June 2, 1980, the trial judge attempted to select a jury in Westmoreland County. This effort was aborted because of extensive pre-trial publicity.

The second effort occurred on September 3-12, 1980 in Dauphin County. One hundred jurors were examined over a seven-day period. This process was aborted because a newspaper article, which alluded to four murders committed by the Defendants, was circulated in the jury assembly room. Because of the great possibility of prejudice to the Defendants, the trial judge granted Defendant's motion for mistrial. Seven jurors had been selected before the motion for mistrial was granted.

The third effort was successful. This jury selection process took place in Reading, Pennsylvania (Berks County). It took twelve days, starting on January 5, 1981 and concluding on

January 19, 1981. One hundred eighty-seven jurors were examined to select twelve jurors and four alternates. The law applicable to the number of peremptory challenges permitted in capital-punishment cases on January 5, 1981 is as follows:

> "(b) Trials Involving Joint Defendants:
>
> (1) In trials involving joint defendants, the defendants shall divide equally among them that number of peremptory challenges that the defendant charged with the highest grade of offense would have received if tried separately; provided, however, that each defendant shall be entitled to at least two (2) peremptory challenges. Where such division of peremptory challenges among join defendants results in a fraction of a peremptory challenge, each defendant shall be entitled to the next highest number of such challenges.
>
> (2) In trials involving joint defendants, it shall be within the discretion of the trial judge to increase the number of peremptory challenges to which each defendant is en-

titled up to the number of peremptory challenges that each defendant would have received if tried alone.

(3) In trials involving joint defendants, the Commonwealth shall be entitled to peremptory challenges equal in number to the total number of peremptory challenges given to all of the defendants." (Pa. Rule of Criminal Procedure 1126(b); effective August 1, 1980.)

Irrespective of the law relative to peremptory challenges applicable at that time, the trial judge announced, at the beginning of jury selection, that the Commonwealth would have twenty peremptory challenges and each Defendant would have twenty peremptory challenges. The bottom line of this ruling is that Commonwealth would only have twenty peremptory challenges, and the Defendants would have forty. (Under Rule 1126, both Defendants were entitled to a total of twenty, and the Commonwealth would be entitled to the total possessed by both

Defendants. According to the above-quoted rule, the Commonwealth was entitled to forty peremptory challenges, however, the Commonwealth was limited to twenty.) Each party was also granted one additional peremptory challenge for each two alternates to be selected. At the conclusion of selecting the first twelve jurors, the Commonwealth exercised nineteen peremptory challenges. Defendant-Lesko had utilized all twenty of his peremptory challenges. Defendant-Travaglia had utilized all twenty of his peremptory challenges. In selection of the alternates, the Commonwealth exercised one peremptory challenge; Defendant-Lesko used two; and Defendant-Travaglia used two. The fact that the Commonwealth did not use all of its peremptory challenges in selecting the first twelve jurors is relevant because if the trial judge would not have

granted the challenge for cause relative to Esther Kroh, the Commonwealth had an unused peremptory challenge. This would have resulted in the same jury being selected irrespective of the trial judge's ruling.

To insure that the questioning of the prospective jurors be conducted within constitutional limitations, the trial judge submitted a list of approved questions. These approved questions set the general parameters of the scope of inquiry. This list of approved questions has been admitted into the record as Court Exhibit No. 1. Those approved questions which relate to capital punishment are as follows:

> "16. Do you have any conscientious scruples against imposing the death penalty?
>
> a. (An affirmative answer will not be sufficient to sustain a challenge for cause. If the

juror answers in the affirmative, the juror should be asked the following question:

i. Are your feelings against the death penalty such that you would automatically vote against the imposition of such punishment irrespective of what evidence is presented and what law is given to you by the Trial Judge?

-or-

ii. ALTERNATIVE QUESTION: If in the trial of this case the evidence and the law establish that the death penalty should be imposed, could you participate in the imposition of the death penalty even though you have certain reserved feelings about the propriety of the death penalty?

ALTERNATE CAPITAL PUNISHMENT QUESTION:

16. Do you have any personal, moral or religious belief

or convictions against capital punishment?

a. (If prospective juror answers yes:)

Are these beliefs or convictions so firm that you would automatically vote against the imposition of the death penalty irrespective of any evidence or law presented to you in this trial?"

You will note that the above-quoted approved questions incorporate the mandates and guidelines expressed by our United States Supreme Court in Witherspoon v. Illinois (1968) 391 U.S. 510, 20 L.Ed.2d 776. A review of the transcript relative to jury selection will establish that in every instance the trial judge religiously followed these guidelines; therefore, Defendant's general allegation that venireman were excluded in violation of Witherspoon v. Illinois, supra, is without merit.

Defendant's brief specifically avers that:

> "In particular, the exclusion for cause of Ms. Kroh [N.T. 487] was in direct violation of Witherspoon. During the course of her examination, Ms. Kroh stated that she was 'opposed to the death penalty.' [N.T. 260] However, when the Court asked her whether she would refuse to participate in imposing the death penalty under any circumstances, she did not respond with an unequivocal affirmative answer but merely reiterated, 'Well, I am opposed, yes.' The Court then stated, "You're opposed to the death penalty.' and Ms. Kroh replied, 'Yes, sir.' [N.T. 261]" (PP. 6 and 7 of Defendant-Lesko's Brief)

The exclusion of Esther Kroh (the 19th prospective juror called) on Commonwealth's motion for cause was proper and her exclusion is based on two reasons: first, her inconsistent answers indicate that she either violated her oath or was unable to understand the questions that were asked. In either case, she was not qualified to serve as

a juror because all jurors must abide by their oaths; each juror must be willing to follow the law presented by the trial judge and each juror must be able to follow the law presented by the trial judge. A juror must assume her duty with such impartiality and comprehension that she will be able to consider all the testimony and instruction so that she could intelligently decide not only why and when a death sentence should not be imposed but also why and when it should be imposed.

Secondly, Ms. Kroh stated that she could not participate in imposing the death penalty irrespective of the evidence presented to her. This declaration disqualifies her as a juror in this case. The law of our Commonwealth provides for the imposition of the death penalty under certain circumstances. Consequently, her declaration indicates

she would violate the law of the Commonwealth and the oath of a juror to base her determination on the evidence and the law. Counsel for the Defendant contends that Ms. Kroh's answer was ambiguous. This writer, as the trial judge, neither heard nor observed any ambiguity to the following quoted question. The answer was a clear and emphatic, "Yes."

> "Q. THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespectfive of what evidence was given to you?
>
> A. Well, I am opposed, yes."
> [N.T. 261]

The trial judge had the opportunity to hear the emphasis placed on words; he had the opportunity to consider pauses between words. These are not discern-

ible from the record. He had the opportunity to observe the demeanor and facial expressions of the witness. The trial judge properly ruled that this prospective juror was not qualified to serve and properly granted the challenge for cause. The exclusion of Ms. Kroh does not violate the mandates established by Witherspoon v. Illinois, supra. Witherspoon does not prevent the exclusion of veniremen who would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial or those whose attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. To properly evaluate the trial court's decision, one must read Esther Kroh's comments taken in context of her entire examination. The

relevant portion of her testimony is as follows:

"EXAMINATION BY MR. GEARY:

Q. Good morning. What is your name?

A. My name's Esther Kroh....

Q. Do you have any conscientious scruples against imposing the death penalty?

A. No sir.

Q. In the event that either or both of the defendants in this case were convicted of murder in the first degree, it would be the responsibility of the jury at that point to then hear additional evidence and again be charged by the Court and deliberate again, and in deliberations they would determine whether or not those persons that had been convicted of murder in the first degree would be sentenced to either life imprisonment or to death. And that is the jury's function. Now, knowing that, if you were placed into that situation, would you automatically vote one way or the other irrespec-

tive of the evidence or the law that was given to you?

A. Well, I think I would vote either way.

THE COURT: You're saying you would vote on the evidence?

A. Yes....

Q. Would you give any greater weight to the testimony of a police officer witness as opposed to any other witness, simply and solely because the one person was a police officer?

A. No sir.

Q. Would you give any lesser weight to the testimony of a police officer witness, simply and solely because he was a police officer?

A. That question I don't think I'll be able to answer.

Q. Why is that?

THE COURT: Do you understand his question? Some of these questions are rather difficult, and you should carefully con-

sider them, but let me explain it to you this way.

Let's assume that you are selected as a juror, and one of the witnesses who comes and testifies and you listen to him is a police officer, and when he leaves the stand one of the other witnesses that comes up and testifies--that witness is not a police officer. But both of those witnesses--they testified about the same thing, and they were inconsistent, there were differences in their testimony. What Mr. Geary is asking you, would you give any lesser weight to the testimony of that first witness who is a police officer, simply because he was a police officer?

A. No, I would not.

MR. GEARY: This prospective juror is acceptable to the Commonwealth, Your Honor.

EXAMINATION BY MR. McCORMICK:
(Counsel for Defendant-Travaglia)

Q. The judge asked you about the weight you would give the testimony of a police officer, and I may have missed it. Let me just ask, if a--one person testified who was a police officer, and another person testified who was not, would you give greater weight or consider the testimony of the police officer more believable simply because that person was a police officer?

A. Well, in that case, I would say I would give preference. I understand that question better now. I think I would take the policeman's word for it.

THE COURT: Are you saying you would take the word of the policeman, simply because he's a policeman?

A. No, not because he's a policeman, but he's probably more educated, and knows the circumstances better than the other party.

THE COURT: Well then, you are saying

that you would give him greater weight because he's a policeman.

A. Well--

THE COURT: Or would you listen to the testimony--what Mr. McCormick wants to understand, or wants to know, whether or not you would give more weight to the testimony of a policemen as compared to the testimony of another person, and you're going to give that more weight simply because of the fact he was a policeman.

A. Not simply because he's a policeman. I would think he would be more--he'd know the circumstances better than the other individual.

Q. Well, let me ask this ma'am: as regards to the death penalty, should the jury return a verdict against either one or both of these defendants for first degree murder, are your feelings about the death penalty such that if you had to make a decision as to whether or not you

would impose the death penalty or impose a sentence of life, simply because the victim in this case was a police officer, would you then irrespective of the other evidence that you heard vote automatically for the death penalty?

A. No sir. I'm opposed to the death penalty.

MR. McCORMICK: This witness is acceptable to the defendant.

THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you?

A. Well, I am opposed, yes.

THE COURT: You're opposed to the death penalty?

A. Yes sir.

THE COURT: Mr. Marsh?

> MR. MARSH: She's acceptable.
>
> MR. GEARY: Please the Court, the Commonwealth would challenge for cause at this point....
>
> [N.T. 253-261; Emphasis supplied]

For the reasons set forth above, Defendant's second reason has no merit and is dismissed.

Reasons III, IV, V, and VI all relate to the constitutionality of the Pennsylvania capital punishment statute and will be addressed by the Court collectively. Reasons III, IV, V and VI are as follows:

> III. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA.C.S.A. § 1311 IS IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION. (The Sentencing Code, of which 18

Pa.C.S.A. § 1311 is a part, has been transferred to the Judicial Code and is currently found at 42 Pa.C.S.A. 9711.)

IV. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA.C.S.A. § 1311 IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION IN THAT IT PLACES THE BURDEN OF PROVING MITIGATING CIRCUMSTANCES UPON THE DEFENDANT.

V. EXCLUSION FOR CAUSE OF VENIREMAN WHO STATED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE STATE AND FEDERAL CONSTITUTION.

VI. EXCLUSION FOR CAUSE OF VENIREMEN WHO STATED THAT THEY WOULD

AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED APPELLANT'S RIGHT TO JURY TRIAL WHICH IS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

The Defendant's brief and argument set forth the following specific reasons in support of the above-quoted general reasons:

a. The provision of the Pennsylvania death penalty statute which requires the jury to find the death sentence if they find one or more aggravating circumstances and no mitigating circumstances is in violation of the cruel and unusual punishment clause of the state and Federal Constitution. (Defendant's reason No. III)

b. The provision of the Pennsylvania death penalty statute which specifies that mitigating circumstances must be proved by the defendant by a preponderance of the evidence is a violation of the due process clause of the 14th

Amendment to the Federal Constitution. (Defendant's reason No. IV)

c. The exclusion of veniremen who stated that they would automatically vote against the death penalty is a violation of the cruel and unusual punishment clause of the state and Federal Constitution and the Defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution. (Defendant's reasons Nos. V and VI)

Let us first address Defendant's contention that the provision of the Pennsylvania death penalty statute which requires a jury to impose a death sentence if they find one or more aggravating circumstances and no mitigating circumstances is cruel and unusual punishment, thus unconstitutional. The Defendant is alluding to the following provision of the Pennsylvania death penalty statute:

"(C)(IV) The verdict must be a

> sentence of death if the jury unanimously finds at least one aggravating circumstances...and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases." (42 Pa.C.S.A. 9711)

The United States Supreme Court has declared unconstitutional several mandatory death penalty statutes: WOODSON V. NORTH CAROLINA (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978; ROBERTS v. LOUISIANA (1976) 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 reh den 429 U.S. 890, 50 L.Ed.2d 173, 97 S.Ct. 248; WASHINGTON (1976) 428 U.S. 906, 49 L.Ed.2d 1213, 96 S.Ct. 3214 reh den 429 U.S. 890, 5 L.Ed.2d 174, 97 S.Ct. 248; ROBERTS V. LOUISIANA (1977, U.S.) 52 L.Ed.2d 637, 97 S.Ct. 1993, 5 Ohio Ops 3rd 252. All of the mandatory sentences that were declared unconstitutional were distinctly different from the Pennsyl-

vania death penalty statutes. Each of the unconstitutional statutes merely defined a specific crime or crimes and then made the death sentence mandatory. These statutes did not provide standards to guide the jury in its function of imposing a sentence. In declaring the mandatory death sentence in WOODSON V. NORTH CAROLINA, supra, unconstitutional, the United States Supreme Court stated that this statute provided no standards to guide the jury in its inevitable exercise of power to determine which first-degree murderer should live and which should die. The Court further stated that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense. The Court stated that these are consti-

tutionally indispensable parts of the process of inflicting the death penalty.

In declaring the death penalty statutes in the other cases unconstitutional, the United States Supreme Court basically expressed the same reasons and guidelines. In each of these cases the Court ruled that the unconstitutional statutes afforded no meaningful opportunity for considerations of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.

The Pennsylvania death penalty complies with all the mandates and requirements outlined by the United States Supreme Court. The guidelines contained within the Pennsylvania Statute compel the jury to consider aggravating circumstances and mitigating circumstances in determining which first degree murderers

should live and which should die. The jury cannot impose the death sentence without considering aggravating and mitigating circumstances which relate to the character and record of the individual offender and the circumstances of the particular offense; the jury cannot impose the death sentence even under the mandatory aspects of the statute without finding that there were no mitigating circumstances. The Pennsylvania statute specifically provides aggravating circumstances and mitigating circumstances, thus compelling the jury into a meaningful consideration of the particular crime and the relevant attributes of the offender. A consideration of these factors minimizes the risk of wholly arbitrary and capricious action.

For the above-mentioned reason, Defendant's Reason No. III has not merit

and is dismissed.

Next let us consider Defendant's contention that the provision of the Pennsylvania death penalty statute which specifies that "mitigating circumstances must be proved by the defendant by a preponderance of the evidence" is unconstitutional. (Defendant's Reason No. IV)

Defendant's argument on this point and the cases cited by Defendant are completely out of perspective. One important fact ignored in Defendant's argument is that this burden on the Defendant is in the penalty phase of the trial. This is after the Defendant has been found guilty of first degree murder beyond a reasonable doubt. The Defendant no longer has a presumption of innocence.

The Pennsylvania death penalty statute requires the Commonwealth to prove the aggravating circumstances be-

yond a reasonable doubt. (The aggravating circumstances are the bad facts concerning the particular crime and the attributes of the offender.) This statute requires that the mitigating circumstances be proven by a preponderance of the evidence. (The mitigating circumstances are the good facts concerning the particular crime and the attributes of the offender.)

These procedural requirements are necessary to achieve justice and are constitutionally mandated. Justice is not a concept that can be achieved by arbitrary and capricious actions. It is not justice to the defendant to allow the jury to dream or imagine the existence of aggravating circumstances; it is not justice to society to allow the jury to dream or imagine the existence of mitigating circumstances. Justice demands a procedure which minimizes the

risk of the jury fabricating its findings or imagining the existence of facts for the purpose of imposing the death sentence or for the purpose of avoiding an unpleasant task like imposing the death sentence.

> "The instinct of retribution is part of the nature of man and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self help, vigilante justice and lynch law." (FURMAN V. GEORGIA [1972] 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 reh den 409 U.S. 902, 34 L.Ed.2d 163, 93 S.Ct. 89.)

To properly understand the justness of this procedure we must understand the burden of "preponderance of the evidence." To prove a fact by a "preponderance of the evidence" is to prove

that the fact is more probably true than not. It is the tipping of the scales in favor of its existence to the slightest degree. This slight burden of proof is necessary to separate fact from fiction, dreams from reality; it minimizes the pitfalls of capriciousness and arbitrariness. A juror takes an oath that his or her determinations will be based upon the law and the evidence. To allow a juror to fabricate or dream up a mitigating circumstance or fact would be allowing that juror to violate his or her oath. To require proof of mitigating circumstances or facts by a measure less than a "preponderance of the evidence" is permitting such fabrications or dreams.

This burden of proof in death sentence statutes is constitutionally mandated. The United States Supreme Court in the landmark case of FURMAN V.

GEORGIA, supra, established a constitutional requirement for all death penalty statutes.

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious actions." (GREGG V. GEORGIA [1976] 428 U.S. 153, 49 L.Ed.2d 859 [at page 883], 96 S.Ct. 2909.)

Based upon the cases and rationale set forth above, this Court finds Defendant's reason No. IV to be without merit and it is dismissed.

The final constitutional objection by Defendant is that the exclusion of veniremen who stated that they would automatically vote against the death penalty is a violation of the cruel and unusual punishment clause of the state and federal constitutions and the Defen-

dant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution. (Defendant's reasons Nos. V and VI)

Defendant's contentions, as expressed in reasons V and VI, never have been the law, are not the law and never will be the law of our land. To follow Defendant's argument (as expressed in his brief in Reasons V and VI) to its logical conclusion necessitates the acceptance of one or two false premises: that capital punishment, per se, is unconstitutional, OR, a juror may be the law unto himself.

Our entire concept of justice is based upon the fundamental principle that all jurors must base their decisions on the law of the land. To allow a juror to ignore the law is the threshold of anarchy.

It is not likely that capital punishment, per se, will ever be declared unconstitutional. The United States Supreme Court, in July, 1976, sustained the constitutionality of the death penalty and established the stability of capital punishment in the United States. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909; Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960; Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950.

In Gregg v. Georgia, supra, the United States Supreme Court stated:

> "The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule [428 U.S. 177] imposed a mandatory death sentence on all convicted murderers....
>
> It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified,

capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. C 9, 1 Stat. 112 (1790). The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

> 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;...nor be deprived of life, liberty, or property, without due process of law...'

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of 'life, liberty, or property' without due process of law. "For nearly two centuries, this Court, repeatedly and [428 U.S. 197] often expressly, has recognized that capital punishment is not invalid per se....

Four years ago, the petitioners in Furman and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime regardless of its depravity and impact on society. This view was accepted by two Justices. Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.

The petitioners in the capital cases before the Court today renew the 'standards of decency' argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large

portion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the [428 U.S. 180] death penalty for at least some crimes that result in the death of another person...." (49 L.Ed.2d 816-878)

The United States Supreme Court also stated in Gregg v. Georgia, supra:

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." (49 L.Ed.2d 880)

and further:

"The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms

> of their own local conditions and with a flexibility of approach that is not available to the courts. Furman v. Georgia, supra, at 403-405, 33 L.Ed.2d 346, 92 S.Ct. 2726 (Burger, C.J., dissenting). In deed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.
>
> In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature [428 U.S. 187] to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe...." (49 L.Ed.2d 882)

Because Defendant's Reasons V and VI are based on false premises, they have no merit and are dismissed.

VII. THE COURT ERRED IN PERMITTING THE COMMONWEALTH TO INTRODUCE AS AN AGGRAVATING CIRCUMSTANCE FOR SENTENCING, EVIDENCE THAT JOHN LESKO HAD ENTERED A PLEA OF GUILTY IN THE COURT OF COMMON PLEAS OF INDIANA COUNTY TO THE "SECOND DEGREE MURDER" OF WILLIAM NICHOLS, BECAUSE THAT PLEA WAS NOT A "CONVICTION" AS REQUIRED BY THE SENTENCING CODE. (Defendant's seventh reason for new trial.)

The Defendant's seventh reason for a new trial pertains to Section 9711(d) of the Judicial Code (formerly 18 Pa.C.S.A. 1311(d). This section of the Sentencing Act enumerates the aggravating circumstances. The tenth aggravating circumstance is set forth in sub-paragraph (d)

and is as follows:

> "(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment of death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense." (Emphasis supplied) (42 Pa.C.S.A. 9711[d])

At the time of this trial, the Defendant had already pled guilty to second degree murder for killing William Nichols. At the time of this trial, the Defendant had not been sentenced to the mandatory sentence of life imprisonment for the murder of William Nichols. Second degree murder carries a mandatory sentence of life imprisonment. Defendant contends that it was error to submit to the jury the plea of guilty to the Nichols murder as an aggravating circumstance because the Defendant, as of that time, had not been sentenced.

Defendant contends that a plea of guilty before the formal imposition of the sentence is not a "conviction" within the definition of the tenth aggravating circumstance quoted above. This Court disagrees with Defendant's contentions. A plea of guilty in and of itself is a confession of guilt and is equivalent to a conviction and verdict of guilty by a jury. (See Comm. v. Maroney, 425 Pa. 411, 229 A.2d 913 (1467); United States ex rel Crosby v. Brierley, 404 F.2d 790, 797 (1968). (The Defendant's contention presents the following interesting query: Is a jury's verdict of guilty not a conviction until the sentence is imposed?)

The plea of guilty to the Nichols murder in Indiana County meets the criteria and requirements as specified in aggravating circumstance No. 10 quoted above.

1. The Nichols murder was committed by the Defendant before the Miller murder;

2. At the time of the Miller trial, the Defendant had pled guilty to second degree murder for the killing of Nichols;

3. A sentence of life imprisonment was imposable at the time of Defendant's plea to second degree murder for killing Nichols. In fact, life imprisonment is the only sentence that could have been imposed in the second degree murder plea of guilty.

For the reasons set forth above, Defendant's Reason No. VII is dismissed.

VIII. THE DEFENDANT WAS SUBJECTED TO AN ILLEGAL ARREST BY PITTSBURGH POLICE, AND DEFENDANT'S REQUEST FOR SUPPRESSION OF EVIDENCE

SHOULD HAVE BEEN GRANTED. (Defendant's eighth reason for new trial.)

The Defendant contends that his arrest by the Pittsburgh police was illegal; and, therefore, the evidence obtained as a result of that arrest, particularly his statement to the police, should be suppressed. There is no dispute concerning the facts of the arrest which took place in a Pittsburgh hotel room on January 3, 1980, at 10:25 p.m. At the time of the arrest, the police officers possessed a warrant for the arrest of Michael Travaglia on the charge of receiving stolen property. Entry to the room was made with the aid of the night clerk who unlocked the door to the Defendant's room with a passkey, and the police neither announced their identity or purpose before entering. The officers found both defendants in

the room, and John Lesko pointed a handgun at the officers before surrendering. The Defendant argues that the police conduct described above violates R.C.P. 2007 and 2003(c). Both rules deal with the execution of search warrants, but we will, for the sake of argument, accept their contention that they are applicable to the present situation. Rule 2007 provides that law enforcement officers must give notice of their identity and authority to the occupant of the premises prior to attempting a forcible entry. Rule 2003(c) precludes the execution of a warrant after 10:00 p.m. absent affidavits showing justification for the nighttime entry. We note, however, that Rule 2007 requiring notice before entry specifically states that the officer need not give such notice if "exigent circumstances require his immediate

forcible entry." We believe that if there are exigent circumstances that would eliminate the need for notice under Rule 2007 that such circumstances would more than justify the abrogation of the nighttime entry requirements of R.C.P. 2003(c). We accept the Defendant's contention that the occupants of a hotel room are entitled to protection against unreasonable searches and seizures, Stoner v. California, 376 U.S. 483, 11 L.Ed.2d 856, 84 S.Ct. 889 (1964), and that absent exigent circumstances, a person may not be arrested in their time for a felony without a warrant, Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). There is, however, no authority precluding the police from a warrantless arrest in a suspect's home or hotel room where exigent circumstances exist. While there is no absolute test as to

what constitutes exigent circumstances, the Pennsylvania Supreme Court, in Comm. v. Williams, Pa. 396 A.2d 1177 (1978), has adopted the guidelines set forth by the federal court in Dorman v. United States, 140 U.S. App. D.C. 320, 435 F.2d 385 (1970):

> "Terms like 'exigent circumstances' or 'urgent need' are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant, and that it is only in the light of those circumstances and that need that the warrantless search meets the ultimate test of avoiding condemnation under the Fourt Amendment as 'unreasonable.' While the numerous and varied street fact situations do not permit a comprehensive catalog of the cases covered by these terms, it may be useful to refer to a number of considerations that are material, and have particular pertinence in the case at bar.
>
> First, that a grave offense is involved, particularly one that is a crime of violence....

Second, and obviously interrelated, that the suspect is reasonably believed to be armed. Delay in arrest of an armed felon may well increase danger to the community meanwhile, or to the officers at the time of the arrest....

Third, that there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including 'reasonably trustworthy information' to believe that the suspect committed the crime involved.

Fourth, strong reason to believe that the suspect is in the premises being entered.

Fifth, a likelihood that the suspect will escape if not swiftly apprehended.

Sixth, the circumstances that the entry, though not consented, is made peaceably....

Another factor to be taken into account, though it works in more than one direction, relates to time of entry - whether it is made at night...." Commonwealth v. Williams, supra, at 1179, 1180.

It is incumbent upon us to measure the facts and circumstances as known to the arresting officers and supported by the record against the guidelines referred to above in order to make a determination as to whether or not exigent circumstances were present that would justify the warrantless entry into the Defendants' hotel room. Before, however, we apply an item-by-item analysis, it is necessary that we review the circumstances known to the police at the time of the arrest.

Between December 27, 1979 and January 3, 1980, three unsolved homicides occurred in Westmoreland County. On December 27, 1979, Peter Levato was shot to death by a .22 caliber weapon. On January 1 or January 2, 1980, Marlene Sue Newcomer was also killed by a .22 caliber weapon; and on January 3, 1980, Patrolman Leonard Miller was shot to

death with a .38 caliber revolver. During approximately the same period of time there were a series of armed robberies involving convenience stores located in Westmoreland and Indiana Counties. In each of these robberies the victims were tied at the scene by the robbers who used yellow electrical wire to bind them. Bernard Travaglia, the father of the Defendant, Michael Travaglia, informed the Pennsylvania State Police that a spool of yellow electrical wire had been stolen from him along with a .38 caliber revolver. Mr. Travaglia indicated to the police that he suspected his son, Michael, of stealing the revolver; and an inspection of Michael Travaglia's truck, which had been repossessed by the Leechburg Bank, revealed to the police yellow electrical wire similar to that which had been stolen from Bernard Travaglia and which

had been used in the robberies referred to above. Mr. Travaglia also advised the police that his son, Michael, did possess a .22 caliber pistol and that Michael had advised him that the gun had been recently confiscated by a game warden. A check with the Pennsylvania Game Commission by the State Police did not reveal any such incident of confiscation. Further, the victims of a hold-up at a Seven-Eleven store in Indiana County reported to the police that when they were robbed on January 1, 1980, they were tied with yellow electrical wire and that they observed the robbers flee the scene in a tan Dodge Ram Charger with window curtains. A similar vehicle was thereafter discovered in a Pittsburgh parking garage containing the body of Marlene Sue Newcomer.

On January 3, an arrest warrant was issued against Michael Travaglia for receiving stolen property relative to a burglary at Sonny's Lounge on Route 22 in Delmont, Westmoreland County. It was known that Michael Travaglia and an unknown individual were then staying at the Thatcher Motel which was located next to Sonny's Lounge. Peter Levato's car had been found abandoned on December 29, 1979, within one mile of the Thatcher Motel.

In regard to the Miller homicide, the police knew that the windows in the escape vehicle had been shot out and that three men were known to be hitchhiking from the area of the homicide in the general direction of Pittsburgh. One of the men was believed to be bleeding, and a motorist who had given a ride to a similar trio, knew one of the hitchhikers, Michael Travaglia,

by name. The police subsequently learned that a Michael Simons, an alias which Michael Travaglia was known to have used, and a Mr. Lesko had rented Room 616 in the Edison Hotel in Pittsburgh.

The police also contacted Daniel Keith Montgomery, a person they had reason to believe had been rooming with Michael Travaglia at the Thatcher Motel in Delmont. Mr. Mongtomery was located by the police at a restaurant across the street from the Edison Hotel and he had in his possession a .38 caliber revolver and ammunition. Montgomery explained to the police officers that he had received the revolver from Michael Travaglia who was then across the street with John Lesko in Room 616 of the Edison Hotel. Montgomery related that Travaglia had informed him that he was giving Montgomery the gun because the gun had been

used in the shooting of a police officer. Montgomery advised the police as well that there was a .22 caliber revolver still in Lesko's possession.

The police then determined from the night clerk at the hotel that the occupants of Room 616 were still in their room and then made their entry as referred to above.

We will compare this factual situation with the considerations discussed in Comm. v. Williams, supra.

1. A grave offense was involved. The police had sufficient information to make Michael Travaglia a suspect in three homicides committed within a six-day period. In addition, the police were aware that Michael Travaglia had told Daniel Keith Montgomery that he had shot a police officer.

2. The suspect was reasonably believed to be armed. When Montgomery was questioned by the police, he informed them that he had seen Lesko and Travaglia

in the hotel room only a few minutes before and that Lesko was in possession of a .22 caliber pistol.

3. There was a clear showing of probable cause to believe that the suspects had committed a crime. The police were aware that a .38 caliber revolver had been stolen from Bernard Travaglia and that Daniel Keith Montgomery had surrendered a similar weapon to the police, relating to them that the weapon had been given to him by Travaglia because he had used it to shoot a police officer. This information coupled with the fact that wire of the type used in several robberies (including one in which the robbers fled in a vehicle similar to the one in which Mrs. Newcomer's body was found) was found in the truck owned by Travaglia and repossessed by the bank and Travaglia's presence and departure from the general area in which Patrolman Miller had been shot provided clear probable cause for the arresting officers.

4. There was strong reason to believe that the suspects were in the premises being entered. This, of course, was verified by Montgomery's statement that he had seen the suspects in Room 616 of the Edison Hotel only minutes before and the information provided by the night clerk who eventually admitted the officers into the suspects' room.

5. There was a likelihood that the suspects would escape if not swiftly apprehended. As already indicated, Montgomery had already told the police that Travaglia had told him that he had "shot a cop" and that he had given him the .38 caliber revolver and ammunition to dispose of the same. Such actions were clearly consistent with an attempt to rid himself of incriminating evidence and to evade detection for the crimes that had been committed. The fact that the suspects were not at their permanent residence and that Travaglia had registered under an alias was sufficient to warrant the conclusion that the suspects were attempting to avoid detection and were likely to leave at any

time. In short, there is no reason to believe that the suspects would, in fact, stay throughout the night.

6. Without question, the entry into the hotel room was made forcibly without warning or notice and was, as indicated before, done during the night. The brief on behalf of the defense places great emphasis on the fact that the defendants were on the sixth floor of the hotel and that there was no evidence that there was any avenue of escape open to them except through the corrdor outside their room. They, therefore, argue that the proper procedure for the police to have followed would have been to place a guard in the corridor to insure that the defendants did not leave their room while other officers went before a magistrate to obtain an arrest warrant. We believe that such a procedure would have placed the lives of the police officers and the defendants in jeopardy. The police were well aware that the occupants of the room were armed and capable of desperate acts. To follow the procedures

> suggested by the defense would have invited a shootout in the event that the defendants attempted to leave the room. We cannot agree that the officers are required to put themselves in such perilous position.

We conclude, therefore, that the circumstances present here were so urgent as to justify a warrantless arrest.

It should also be noted that the police at the time of the arrest were in possession of a valid arrest warrant issued against Michael Travaglia, albeit on a charge of receiving stolen property, and that the pointing of the handgun at the police officers by John Lesko upon their entry into the room constituted an offense committed in the presence of the officers, thereby providing additional justification for his arrest.

Based upon the facts surrounding the arrest of the Defendant and Michael Travaglia, and the legal precedent cited

above, this Court finds that the arrests were legally permissible because of exigent circumstances. Consequently, the evidence obtained as a result of those arrests, particularly the statements given to the police, are admissible at the time of trial.

For the reasons mentioned above, Defendant's eighth reason for a new trial has no merit and is dismissed.

IX. THE "MIRANDA WARNING" ADMINISTERED TO THE DEFENDANT BY PITTSBURGH POLICE WAS INADEQUATE UNDER THE LAW BECAUSE THE DEFENDANT WAS NOT ADVISED THAT HE WAS A SUSPECT IN THE CRIMINAL HOMICIDE OF LEONARD CLIFFORD MILLER, AND THE USE OF THE CONFESSION AS EVIDENCE AT TRIAL VIOLATED THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT. (De-

fendant's ninth reason for new trial.)

The Defendant, Lesko, contends that although he was given his Miranda warnings by the Pittsburgh police prior to making his inculpatory statement, that his waiver of his Fifth Amendment rights was invalid inasmuch as at the time he made the waiver he was not aware that he was a murder suspect, but rather believed that he was being questioned concerning the charge of violation of the Uniform Firearms Act and assault arising out of his apprehension at the Edison Hotel. It is true that a waiver of rights will not be valid if the police have disguised the purpose of their interrogation, Commonwealth v. Richmond, Pa. 320 A.2d 351 (1974); Commonwealth v. Collins, Pa. 259 A.2d 160 (1969); Commonwealth v. Dickson, Pa. 379 A.2d 553 (1977). But the contention of Mr. Lesko

is simply not supported by the record. He was, in fact, advised of the seriousness of his situation and was aware that the police were not concerned with relatively minor charges. At the suppression hearing, Detective Amity testified as follows:

> "Q. After you filled out this pre-interrogation warning form, what did you do?
>
> A. Well, we advised him of the charges that we arrested him for.
>
> Q. What were those?
>
> A. Violation of the Uniform Firearms Act and the Recklessly Endangering Another Person. And we also told him that he was a suspect in several murders that happened and wanted to talk to him about those.
>
> Q. After you told him this, what was the next thing that happened?
>
> A. He was more than willing to tell us about everything that he did." (Suppression hearing transcript, page 558.) (Emphasis supplied)

It is apparent that Mr. Lesko's contention in this area is without merit; therefore, Defendant's ninth reason for new trial is dismissed.

X. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AFTER THE COURT SUBMITTED ITS INSTRUCTIONS TO THE JURY CONCERNING THE CHARGE OF CRIMINAL CONSPIRACY TO COMMIT MURDER. (Defendant's tenth reason for a new trial.)

In his brief, Defendant contends that Rule No. 228(a) of the Criminal Rules of Procedure precludes the joinder of criminal homicide (which includes murder) and criminal conspiracy. Defendant further contends that since the Defendant was tried on the charges of criminal homicide (including murder) and criminal conspiracy, this was a violation of Rule No. 228(a), thus necessi-

tating the granting of a new trial.

The Defendant's position on this point is specifically set forth on page 45 of his Brief:

> "The violation of this Rule by the District Attorney, and the failure of the Court to provide relief to the Defendant prior to trial on this point, is a denial of procedural due process of law, requiring a new trial."

Rule 228(a) of the Criminal Rules of Procedure is as follows:

> "When murder is alleged in an information no other counts may be joined in the information except voluntary and involuntary manslaughter.

This Court disagrees with the Defendant's position. Neither Rule 228(a) nor the joinder of criminal homicide and conspiracy <u>in this case</u> has anything to do with "procedural due process of law." In this particular case, the Defendant is not entitled to a new trial because the Defendant was not prejudiced

by the joinder of the two charges. A new trial is not warranted for the following reasons:

1. In this particular case, the individual trials on the charge of criminal homicide of Leonard Clifford Miller and the charge of criminal conspiracy to commit criminal homicide of Leonard Clifford Miller would entail a duplicate presentation to the jury of exactly the same evidence. The primary purpose of joinder of offenses is to serve the goal of trial economy and convenience by insuring that the acts or transactions supporting the crimes charged need only be proven once (See U.S. v. Borish, 452 F.Supp. 518 (1978).

In the case at bar, the joinder of the criminal homicide and criminal conspiracy did not result in any

prejudice or injustice. On the other hand, the consolidation provided judicial economy. The guidelines for permissive joinder have been set forth in the case of Comm. v. Morris, 425 A.2d 715 (1981). These guidelines are hereinafter set forth and it is to be noted that the consolidation of the criminal homicide and criminal conspiracy, in the case at bar, falls within the prescribed guide- lines.

> "The traditional justification for permissible joinder of offenses or consolidation of indictments appears to be the judicial economy which results from a single trial. The argument against joinder or consolidation is that where a defendant is tried at one trial for several offenses, several kinds of prejudice may occur: (1) The defendant may be confounded in presenting defenses, as where his

defense to one charge is inconsistent with his defenses to the others; (2) the jury may use the evidence of one of the offenses to infer a criminal disposition and on the basis of that inference, convict the defendant of the other offenses; and (3) the jury may cumulate the evidence of the various offenses to find guilt when, if the evidence of each offense had been considered separately, it would not so find. Commonwealth v. Lasch, 464 Pa. 573, 585, 347 A.2d 690, 696 (1975); Commonwealth v. Peterson, 435 Pa. 187, 194, 307 A.2d 264, 267 (1975); Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964). Thus in arriving at a meaningful standard to guide the trial court in its exercise of discretion, and to permit appellate courts to determine whether the trial court abused this discretion, we must weigh the possibility of prejudice and injustice caused by the consolidation against the consideration of judicial economy." (425 A.2d 717, 718)

2. Rule 228(a) is not of constitutional dimension. Its provisions are not related to, nor do they affect, due process. This is evident from the fact that the Supreme Court of Pennsylvania has rescinded the rule as of July 1, 1982 (See Order of Dec. 11, 1981, Supreme Court of Pennsylvania No. 103, Criminal Procedural Rule, Docket No. 2.)

3. To justify a granting of a new trial, the Defendant must show that the joinder prejudiced the rights of the Defendant. It has long been the law of our Commonwealth that the propriety of consolidating separate indictments or charges for trial is ultimately within the sound discretion of the trial court, and its determination in this regard will not be disturbed unless it

clearly appears that the rights of the defendants were prejudiced. The burden of showing a clear injustice to the defendant is a heavy one. (See Comm. v. Peterson, 307 A.2d 264, 267 (1973); Comm. v. Hill, 388 A.2d 689 (1978); Comm. v. Vickers, 394 A.2d 1022 (1978); Comm. v. Tolassi, 392 A.2d 740 (1978); Comm. v. Morris, 391 A.2d 653 (1978); Comm. v. Fiorni, 390 A.2d 774 (1978); U.S. v. Niederberger, 580 F.2d 63 (1978); Comm. v. Morris, 425 A.2d 715 (1981.)

4. In cases such as this, where two co-defendants committed three separate murders in Westmoreland County within a few days, judicial expediency and economics are serious factors. The legal disposition of

the three murders and several robberies committed by these defendants totally dominated the judicial activities in the Westmoreland County courts for the past two years. The judicial proceedings relative to these charges will cost the taxpayers approximately a quarter of a million dollars. To sever the criminal homicide and criminal conspiracy charges would have doubled the required judicial time and cost.

5. Comm. v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), vacated and remanded, 414 U.S. 803 (1973), on remand 455 Pa. 622, 314 A.2d 854 (1974) and Rule 110 of the Pennsylvania Rules of Criminal Procedure mandate that all charges resulting from a criminal "episode"

of each defendant should be consolidated at one trial. The Campana case, supra, holds that a violation of this mandate could preclude subsequent prosecution of the "same episode offense" as a violation of the Double Jeopardy Clause of the Fifth Amendment. Thus, Campana mandates the joinder of the criminal homicide and criminal conspiracy charges in this particular case.

For the above-mentioned reasons, this Court holds that the Defendant-Lesko was not prejudiced by the joinder of the criminal homicide charge and the criminal conspiracy charge; therefore, the Defendant is not entitled to a new trial and his tenth reason for new trial is dismissed.

XI. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S

OBJECTIONS, THE IDENTIFICATION TESTIMONY OF JAMES HENDERSON, WHICH EVIDENCE SHOULD HAVE BEEN SUPPRESSED FOR THE REASONS SET FORTH IN THE SUPPLEMENTAL MOTION TO SUPPRESS AND AT THE SUPPRESSION HEARING, THE IDENTIFICATION HAVING BEEN OBTAINED BY LAW ENFORCEMENT OFFICIALS IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION. (Defendant's eleventh reason for a new trial.)

Counsel for the Defendant contends that the exhibiting of photos to an identification witness, while Defendant was in custody, without the Defendant or his counsel being present, makes the in-court identification improper. Defense counsel cites Comm. v. Whiting, 439 Pa. 205 (1970) as legal precedent

sustaining his position.

This Court finds that the trial judge did not commit error in admitting into evidence the identification testimony of James Henderson. This Court has considered the following factual circumstances in arriving at its decision. These factual circumstances emphatically refute Defendant's position:

1. At the time the photographic displays were shown to James Henderson by Detective DelleDonne, no comments or suggestions were made that would lead him to select one photograph over any other.

2. When the two photographic displays were shown to James Henderson on January 7, 1980, he identified the pictures of John Lesko and Michael Travaglia as being two of the three individuals he drive from

Plum Borough to McKeesport on the morning of January 3, 1980.

3. James Henderson identified Michael Travaglia as an individual whom he had known for a period of ten years. It was because of this close association with Michael Travaglia that James Henderson agreed to give Defendant-Lesko and Defendant-Travaglia a ride from Plum Borough to McKeesport on the morning of January 3, 1980. This was shortly after the Defendants abandoned the Lancia automobile, which was stolen from William Nichols.

4. Mr. Henderson had the opportunity to closely and clearly observe Defendant-Lesko for approximately one-half hour. During this period of time, Mr. Henderson held casual conversations with both

defendants.

5. There is a considerable amount of evidence other than the testimony of James Henderson to establish that Defendants, Lesko and Travaglia, were with Mr. Henderson at the time in question.

All of the above-mentioned facts emphatically and conclusively establish that Mr. Henderson's identification testimony relative to Defendant-Lesko was based on seeing and talking with Defendant-Lesko shortly after the killing of Officer Miller and not upon the photos exhibited to the witness by the county detective.

There is one legal reason which totally refutes Defendant's position. Defendant relies on Comm. v. Whiting, supra, which is based upon the United States Supreme Court case, U.S. v. Wade, 388 U.S. 218 (1967). The holding of

these cases was that the Sixth Amendment created the right of the Defendant's counsel to be present at a display of photos to an identification witness when the defendant was in cus- tody. However, the United States Supreme Court, in U.S. v. Ash, 413 U.S. 300, 37 L.Ed.2d ___ (1973), retreated from this position and states:

> "...the Sixth Amendment does not grant the right of counsel at photographic displays conducted by the government for the purpose of allowing a witness to attempt an identification of the offender..." (Id. at 413 U.S. 321)

Clearly, the holding in Comm. v. Whiting, supra, is no longer viable in light of the decision in Ash, supra. This very obvious possibility was considered by Mr. Justice Pomery in his concurring opinion in Comm. v. Claitt, 454 Pa. 313, 311 A.2d 925 (1973) wherein

he stated:

> "I concur in the decision of the Court. I deem it appropriate to add, however, that the Supreme Court of the United States has recently held that, 'The Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender.' United States v. Ash, 413 U.S. 300, 37 L.Ed.2d 619 (1973). Insofar as our opinion in Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970), held to the contrary, therefore, it can no longer be considered to be an accurate statement of federal constitutional law...."

It is to be noted that the facts and conclusions of this Court are consistent with the extensive Findings of Fact and Conclusions of Law of Judge Daniel J. Ackerman who conducted the suppression hearings in this case. His findings, conclusions and Order of Court were handed down on October 3, 1980.

For the reason that the Defendant's Reason No. 11 cannot be sustained legally or factually, it has no merit and is dismissed.

XII. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S POINTS FOR CHARGE BY WHICH THE JURY WOULD HAVE BEEN ADVISED THAT IT COULD FIND JOHN LESKO GUILTY OF A DIFFERENT DEGREE OF MURDER THAN THE JURY MIGHT RETURN FOR MICHAEL TRAVAGLIA. (Defendant's twelfth reason for a new trial.)

A review of the trial court's charge in its entirety clearly establishes that the jury could have found John Lesko guilty of a different degree of murder than the jury's finding for Michael Travaglia.

Counsel for John Lesko vigorously argued to the jury that they should find

John Lesko guilty of second degree murder. In regarding the trial judge's entire charge, a second degree murder conviction of John Lesko was a viable verdict irrespective of the jury's finding of first degree murder for Michael Travaglia. The trial judge accurately defined the various degrees of murder, voluntary manslaughter and involuntary manslaughter.

After providing a lengthy and specific definition of all types of criminal homicide, the trial judge again reviewed the distinctive characteristics of all the types of criminal homicide. The trial judge then reviewed the possible verdicts the jury could find for each of the defendants. The trial judge submitted separate verdict slips for each defendant and clearly indicated each possible verdict for each of the defendants.

Within the perameters described in the trial judge's charge, the jury could have found John Lesko and Michael Travaglia guilty of different degrees of murder.

Since the Court's charge is in conformity with the Defendant's suggested Point for Charge, the trial judge's refusal to read the suggested Point for Charge cannot be the basis for a new trial. Therefore, the Defendant's twelfth reason for a new trial has no merit and is dismissed.

XIII. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S OBJECTIONS, THE TESTIMONY OF RICKY RUTHERFORD, CONSISTING OF LEWD AND GRUESOME ACTS ON THE PART OF THE DEFENDANTS TOWARD WILLIAM NICHOLS PRIOR TO THE ALLEGED KILLING OF LEONARD CLIFFORD

MILLER, WHICH EVIDENCE COMPRISED A SEPARATE AND ISOLATED EPISODE, TRANS ACTION AND OCCURRENCE, HAD INFLAMMED THE PASSIONS OF THE JURY AGAINST THE DEFENDANT. (Defendant's thirteenth reason for a new trial.)

The Defendant contends the trial court committed reversible error by allowing the Commonwealth to introduce evidence that the Defendant murdered William Nichols several hours before the shooting of Officer Miller. Defendant contends that the evidence of the other murder is not proof of the commission of the murder in question and that the evidence of another distinct crime is so prejudicial that it strips the Defendant of the presumption of innocence.

During the presentation of the Commonwealth's case, Commonwealth proposed

to introduce evidence which established that the Defendant murdered three other persons within a period of several days. Commonwealth proposed to introduce evidence of the fact that Defendant-Lesko also murdered Levato, Newcomer and Nichols. It was the contention of the Commonwealth that these crimes were admissible because they showed a plan, scheme and design. Commonwealth further contended that the Nichols murder was admissible for another reason in that it established a motive and intent to kill Officer Miller. As noted in the record, the Court carefully weighed the prejudice caused by the introduction of the other murders and the probative value of the proposed evidence. The trial judge permitted the Commonwealth to introduce evidence of the Nichols murder; however, did not permit the introduction of evi-

dence relating to the Levato and Newcomer murders. To properly evaluate the trial court's ruling, one must understand the sequence of events surrounding the killing of Officer Miller.

On December 27, 1979, defendants picked up Peter Levato in the Edison Hotel area of downtown Pittsburgh. They held him at gunpoint, took him in his car to Westmoreland County, beat him, robbed him, and finally one of the defendants shot him in the back of the head with a .22 caliber gun, which Defendant-Travaglia had obtained from a friend. This occurred either late on December 27, or early on December 28, 1979. Levato's car was then abandoned by defendants.

A few days later in the early morning hours of January 1, 1980, defendants, while hitchhiking, were picked up by Marlene Sue Newcomer, who was return-

ing from a New Year's Eve Party in Vandergrift to her home in Fayette County. After taking over her van they tied her up, robbed her and several hours later Defendant-Lesko shot and killed her with the same .22 gun which was used to shoot Peter Levato. This occurred in Westmoreland County on Route 22 near its intersection with Route 66. Later, the same day, the van and body of Marlene Sue Newcomer were abandoned by the defendants in Gimbels' parking lot in downtown Pittsburgh.

Less than two days later in the early morning hours of January 3, 1980, defendants, accompanied by Ricky Rutherford, picked up William Nichols in the Edison Hotel area in downtown Pittsburgh and took him and his car (a Fiat Lancia) to Indiana County. On the way, the defendants beat and robbed him and once there threw him into Blue Spruce Lake.

Defendants left Indiana County in Nichols' car which also had Nichols' wallet in it. Defendants went to Westmoreland County to Defendant-Travaglia's parents' home where they burglarized the garage and stole a .38 caliber handgun. Defendants left and returned a second time to Defendant-Travaglia's parents' home where they committed a second burglary to get bullets for the .38.

The Defendants then proceeded to Apollo in Armstrong County. There, at approximately 4:45 A.M., Defendant-Travaglia, who was driving Nichols' car (Defendant-Lesko in front on the passenger side and Ricky Rutherford in rear), saw a police car in front of the Apollo Seven-Eleven, decided "to have some fun and aggravate the cop" and sped past it and drove up the hill. When there was no response from the police car, Defen-

dant sped past a second time thinking the police car couldn't follow them across the county line (which was at the mid-point of the bridge going out of Apollo). The second time the police car gave chase and Defendant-Travaglia stopped the Lancia at the bottom of the hill in Westmoreland County. Leonard Miller stopped and approached the Lancia. Defendant-Travaglia recognized him by name and by sight. Fearing apprehension by a police officer who knew Travaglia; being in the stolen car of aman they had beaten, robbed and thrown into a lake by tying a large rock around his body, all within two hours prior to this; having in the car the wallet of the dead man; and finally, possessing the .22 caliber gun, which had been the murder weapon in the Levato and Newcomer murders, Defendant-Travaglia shot and killed Leonard Miller

by shooting him two times as Leonard approached the Lancia. Defendants sped away and abandoned the Lancia within a few minutes and began to walk. When the car was found, Nichols' wallet was inside.

Therefore, during the period from the late evening hours of December 27, 1979, through 4:53 A.M. on January 3, 1980, (a period of five days and nine hours) the Defendants brutally murdered four people.

The general rule of law is that the evidence of another distinct crime, not charged in the indictment, cannot be introduced against the defendant since the fact of one crime is not proof of the commission of another, and the evidence of another distinct crime is so prejudicial that is strips the defendant of the presumption of innocence. There are certain recognized exceptions to this

general rule. Evidence of other distinct crimes are admissible where they are relevant to prove: motive; intent; a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other; the identity of the accused as the perpetrator; accident or lack of mistake; and when the two crimes are part of the "same transaction" or "res gestae." This legal precedent has recently been set forth by the Pennsylvania Supreme Court in the case of Comm. v. Styles, 431 A.2d 978 (1981) at page 980:

> "It is well settled that evidence of other unrelated criminal conduct of an accused is generally inadmissible to prove his commission of the crime for which he is being tried. Commonwealth v. Brown, 489 Pa. 285, 414 A.2d 70 (1980); Commonwealth v. Peterson, 453 Pa. 187, 307 A.2d 264 (1973). As we have stated:

> ' "[t]he purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more likely to commit that crime for which he is being tried. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence." '
>
> "...It is equally settled, however, that evidence of other crimes is admissible where it is relevant to prove (1) motive, (2) intent, (3) a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other, (4) the identity of the accused as the perpetrator, (5) accident or (6) lack of mistake. Commonwealth v. Brown, supra."

The trial judge properly excluded the murders of Levato and Newcomer. They had attributes of being a part of a plan, scheme and design in that they

were committed with the same .22 caliber pistol; they were committed within a few days of each other; and were committed in the same county. The murders of Levato and Newcomer were excluded because they were not so closely related that proof of one tended to prove the other. This disassociation is not applicable to the Nichols and Miller murders. Officer Miller was killed within two hours from the time William Nichols was killed. The killings took place within several miles of one another. The Defendants were in the process of leaving the area where they killed Nichols when they murdered Officer Miller. The Defendants were, in fact, in the automobile they stole from Nichols when they shot Officer Miller. Officer Miller was shot by the Defendants as they were leaving the scene of the Nichols murder. These two

crimes were so related that the proof of the Miller murder naturally incorporated proof of the Nichols murder.

The proximity of time and distance between the Nichols and Miller murders, the fact that Miller was killed as the Defendants were leaving the Nichols' murder site, make the two events a part of a chain of events. The Nichols murder is a part of the history of the Miller murder; it is a part of the natural development of the facts. For these reasons the facts surrounding the Nichols murder were admissible as the "same transaction" or "res gestae" exception.

> "Next, appellant objects to the admission at trial of evidence relating to the events which let up to the killing of Bogier, and also the sequel to the killing. The argument is that such evidence, concerning as it did other crimes allegedly committed by appellant, was admitted for the sole purpose of showing appellant's

criminal disposition. We do not agree that such evidence was inadmissible. While it is true that generally evidence of crimes other than the one for which the defendant is being tried is not admissible, there are certain well-defined exceptions to that rule. Among these is the 'same transaction' or 'res gestae' exception. McCormick, Evidence, § 190 at 448 (2d ed. 1972). In Commonwealth v. Williams, 307 Pa. 134, 160 A. 602 (1932), this Court spelled out that exception, saying that such evidence is admissible where 'such prior conviction or criminal act formed a part of a chain, or was one of a sequence of acts, or became part of the history of the event on trial, or was part of the natural development of the fact.' Id. at 148, 160 A. at 607. See also Commonwealth v. Ross, 413 Pa. 35, 195 A.2d 81 (1963); Commonwealth v. Wable, 382 Pa. 80, 84, 114 A.2d 334, 336 (1955). We believe that the evidence of the other events, sordid as they were, was admissible under this exception because they were part and parcel of the violent rampage which resulted in the death of William Bogier; they were necessary to complete the picture of the day in question, not to prove Brown's criminal disposition in general. No error was committed in permitting the full story,

> of which the murder was an integral part, to be told." (Comm. v. Brown, 342 A.2d 84, 90 [1975])

The most important probative factor is that the admission of the Nichols murder was relevant to prove motive and intent to kill. Before the introduction of evidence relating to the Nichols murder, the evidence presented to the jury indicated that Officer Miller was shot for no apparent reason. In his confession to the police, Defendant-Travaglia stated that his thumb slipped on the hammer causing the unintentional shooting of Officer Miller.

There are several important pieces of evidence that could refute Defendant's contention of an accidental and unintentional shooting of Officer Miller and which could give reason to what otherwise was an unexplained killing of

a policeman. These pieces of evidence are as follows:

1. At the time Officer Miller stopped the Defendants, the Defendants were in a unique sportscar that they had just stolen from their previous victim, Mr. Nichols.

2. The time and distance between the Nichols murder and the Miller murder were relatively short.

3. At the time Officer Miller stopped the Defendants, they had in their possession the wallet of Mr. Nichols and the .22 pistol they used to kill Levato and Newcomer.

4. Initially, when the Defendants observed Officer Miller, they merely intended to lure him away from the store so the Defendants could rob that store.

5. As Officer Miller approached the Lancia sportscar, Defendant-Travaglia recognized Officer Miller by name and sight. They grew up in the same area. After recognizing Officer Miller, Defendant-Travaglia shot him twice.

Assuming the above to be factual, the otherwise unexplained irrational and alleged unintentional shooting of a police officer becomes an intentional, self-serving murder. Officer Miller had to die because he knew Michael Travaglia and observed Michael Travaglia in the presence of the other Defendant in a unique sportscar that was stolen from their recent murder victim. They also had in their possession the murder victim's wallet and a .22 caliber pistol used to kill two other victims, Levato and Newcomer. If Officer Miller had lived, he would undoubtedly have connec-

ted the Defendant with the Nichols murder, thus a possible motive for intentionally killing Officer Miller was to prevent that possible association.

It is reasonable to assume that because of the close association between Officer Miller and Defendant-Travaglia, that Officer Miller would recognize Defendant-Travaglia. If Officer Miller continued to live, it is reasonable to assume that Officer Miller would become aware of the Nichols murder and the fact that he owned a unique sportscar (Lancia), which was probably taken by his murderers. If Officer Miller continued to live, it is reasonable to assume that he would direct the finger of attention and suspicion to the occupants of the Lancia. If Officer Miller was killed then and there, he could not point the finger of attention of suspicion to the Defendant's relative to

the Nichols murder.

The evidence surrounding the Nichols murder was very critical to the Commonwealth in its burden of proving the intention to kill; it was important in establishing a possible motive for the killing of Officer Miller; and it was extremely relevant to negate the accidental slipping of the thumb on the hammer of the murder weapon.

Evidence of the William Nichols murder was properly admitted by the trial judge for the following reasons:

a. Evidence of the Nichols murder was relevant in proving motive; this probative value far outweighs the prejudice of introducing evidence of another crime.

b. Evidence of the Nichols murder was relevant in proving intent to kill; this is an essential element of first degree murder and outweighs

the prejudice of introducing evidence of another crime.

c. The Miller murder grew out of, or was caused by, the fact that the Defendants shortly before brutally murdered William Nichols.

d. The Nichols murder and the Miller murder are parts of the history of each other; they are part and parcel of the natural development of the facts of the same transactions.

e. "Additionally, evidence tending to show efforts on the part of the accused to destroy or dispose of incriminating evidence is admissible to show consciousness of guilt. See Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 (1975)." (Commonwealth v. Soli, 417 A.2d 216, 219 (1979])

Counsel for Defendant further alleges that the introduction into evi-

dence of how William Nichols was killed was so prejudicial that it outweighed any probative value, thus necessitating a new trial.

This writer totally disagrees with these allegations. The manner in which William Nichols was killed was essential to prove motive. If the Defendant and Michael Travaglia had accidentally killed William Nichols, there would be a lesser need to kill Officer Miller than if they had brutally and intentionally killed William Nichols.

Another important factor of admissibility of how the Defendant and Michael Travaglia killed William Nichols is that these events were part and parcel of the violent rampage which resulted in the death of Officer Miller. (It is reasonable to conclude that the killings of Levato and Newcomer were also part of the same violent rampage, however, these

killings were more remote in time and place.) The events of how William Nichols was killed were necessary to complete the picture of the day in question, not to prove Lesko's criminal disposition in general. (Evidence of the killing of Levato and Newcomer would fall in this latter category.) The events of how William Nichols was killed are interwoven probative threads that blend into and become an integral part of the picture of why Officer Miller was killed. Some of these interwoven probative threads are:

The Nichols killing and the killing of Officer Millere were committed by Defendant-Lesko and Michael Travaglia within approximately two hours of one another; Officer Miller was killed while these defendants were leaving the scene of the Nichols killing and they were on their way back to Pittsburgh; Officer

Miller was killed while they were in this last victim's (Nichols') sportscar (the Defendants had just stolen the car from William Nichols); the Defendants also had in their possession Nichols' wallet and the .22 caliber pistol used to kill Levato and Newcomer; because Officer Miller and Michael Travaglia knew each other, it was reasonable to assume that Officer Miller was a potential link between the brutal killing of William Nichols and the individuals in his unique sportscar.

The events surrounding the killing of William Nichols and Officer Miller were very close in proximity of time and place. The circumstances surrounding these killings indicate a high probability that the killing of Officer Miller grew out of, and was caused by, the prior set of facts and circumstances relating to the Nichols murder. All of

these facts and circumstances, sordid as they were, were admissible under the "same transaction" or "res gestae" exception.

> "In Commonwealth v. Williams, 307 Pa. 134, 160 A. 602 (1932), this Court spelled out that exception, saying that such evidence is admissible where 'such prior conviction or criminal act formed a part of a chain, or was one of a sequence of acts, or became part of the history of the event on trial, or was part of the natural development of the facts.' Id. at 148, 160 A. at 607. See also Commonwealth v. Ross, 413 Pa. 35, 195 A.2d 81 (1963); Commonwealth v. Wable, 382 Pa. 80, 84, 114 A.2d 334, 336 (1955). We believe that the evidence of the other events, sordid as they were, was admissible under this exception because they were part and parcel of the violent rampage which resulted in the death of William Bogier; they were necessary to complete the picture of the day in question, not to prove Brown's criminal disposition in general. No error was committed in permitting the full story, of which the murder was an intergral part, to be told." (Comm. v. Brown, supra.)

The evidence of HOW Nichols was killed is highly probative to prove motive. Because the jury could determine from the evidence submitted to them that Officer Miller was intentionally killed to eliminate him as a possible link between the Defendants and the brutal killing of Nichols, the manner in which Nichols was killed is highly probative to establish motive and the intent to kill Officer Miller.

The manner in which the Defendants killed Nichols established the nature and type of crime committed by the Defendants in killing Nichols. If Nichols was killed during a struggle, it may indicate voluntary manslaughter; if Nichols was killed when he fell out of the automobile, it may indicate involuntary manslaughter or accident; if he was shot in the arm and then drowned in a lake by putting stones in his shirt and

pushing him under the water, it may indicate first degree murder. The more serious the crime and the more brutal the circumstances, the greater the likelihood that the jury would conclude the Defendants intended to kill the potential link between these acts and the Defendants. The more serious the crime and the more brutal the circumstances, the greater the likelihood the jury would conclude that Officer Miller was intentionally killed to keep him from pointing the finger of association and suspicion to the Defendants' sordid acts.

The prejudice of HOW the Nichols' murder was committed is in direct proportion to its probative value in establishing intent to kill and motive. If Defendants had accidentally killed Nichols, there would be less desire on their part to kill Officer Miller; if

the Defendants killed Nichols during a struggle, there would be a greater desire by Defendants to kill Officer Miller; if the Defendants killed Nichols in a brutal manner, there would be even a greater desire by Defendants to kill Officer Miller and prevent a revelation of such unconscionable and sordid acts on their part.

For any one of the several reasons, set for above, evidence of the Nichols case was admissible in the Miller murder trial; therefore, Defendants's thirteenth reason is without merit and is dismissed.

* * * * *

Defendant, John Lesko, filed a Motion in Arrest of Judgment and assigned the following reason in support of his Motion:

DEFENDANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER THE CONSTITUTIONS

OF THE UNITED STATES OF AMERICA AND THE COMMONWEALTH OF PENNSYLVANIA, AND AS PROVIDED BY PA.R.CRIM.P. 1100.

Defendant's Motion in Arrest of Judgment is based upon an alleged violation of Rule 1100 of the Pennsylvania Rules of Criminal Procedure. The Defendant's Motion in Arrest of Judgment is denied because there was no violation of Rule 1100. The trials relative to the above-captioned case were called to trial by the trial judge within the periods prescribed by Rule 1100. Furthermore, the Commonwealth filed timely petitions for extension of the time under Rule 1100, and the Court granted Commonwealth's petitions because of Commonwealth's diligence in prosecution.

The criminal complaint in the above-captioned case was filed January 4, 1980, and the case was called for

trial on June 2, 1980. This is well within the 180-day period. On June 3, 1980, upon motion of Defendant, a mistrial was granted because of extensive pre-trial publicity. The Defendant's Motion for Change of Venue was granted, and the trial judge immediately requested the Pennsylvania Supreme Court for a designation of a county from which a foreign jury would be selected. This procedure is rather extensive and time-consuming. In spite of the complicated and lengthy procedure, the above-captioned case was again called for trial on September 3, 1980, in Dauphin County. The calling of the case for trial on September 3, 1980, was well within the time prescribed by Rule 1100. After approximately ten days of jury selection, Defendants again made a motion for mistrial because a newspaper article mentioning the other three mur-

ders was circulated in the jury assemblage area. On September 12, 1980, the Court again granted Defendants' Motion for a mistrial.

After the granting of the mistrial on September 12, 1980, trial judge again requested the Supreme Court of Pennsylvania to designate a county from which a foreign jury would be selected. After an extensive and time-consuming procedure, the trial judge called the case for trial in Berks County on January 5, 1981. Again the case was called for trial within the period prescribed by Rule 1100.

Even though it is not necessary, many of the days within the above-mentioned periods were excludable because of the Defendant being involved in other judicial proceedings, thus being unavailable. Even though it was un-

necessary, the Commonwealth also obtained extensions under Rule 1100.

The Defendant's brief contends that Judge Earl S. Keim abused his discretion in refusing Defendant's initial motion for change of venue; thus causing a violation of Defendant's right to a speedy trial and, in particular, a violation of Rule 1100 of the Pennsylvania Rules of Criminal Procedure. This assertion is totally absurd. Judge Keim received extensive evidence on Defendant's motion and considered the lapse of over six months between the date of the killings and the date of jury selection. Unfortunately, Judge Keim did not have the advantage of hindsight. The only delay caused by Judge Keim's decision was two days, June 2 and June 3, 1980. Certainly this two-day delay did not prejudice the Defendant, especially since Rule 1100 was not violated. Even

though unnecessary, the Commonwealth obtained extensions of Rule 1100. Even though the Defendant was occupied in other judicial proceedings and, therefore, was unavailable for trial of the Miller case, the Miller case was called for trial within the 180-day period designated by Rule 1100. The Defendant's case was called for a pre-trial on May 30, 1980; and the jury selection was commenced on June 2, 1980. This was well within the 180-day period prescribed by Rule 1100. At request of Defendant, a mistrial was granted on June 3, 1980. On June 11, 1980, Judge Ackerman granted a motion to extend Rule 1100. Irrespective of this extension, the second trial in the Miller case was commenced within 120 days of the mistrial. The case was called for trial and jury selection was commenced on September 3, 1981 in Dauphin County.

The time period of 120 days set forth in Rule 1100(e) applies to trials following mistrial as it applies to those following post-verdict motions or appeals (Comm. v. Manley, 421 A.2d 636 [1980])

For the second time, Defendant's motion for mistrial was granted during the jury selection process in Dauphin County. The motion for mistrial was granted on September 12, 1980. Immediately thereafter the trial judge notified the Supreme Court and requested designation of another county from which a foreign jury would be selected. On January 5, 1981, this case was again called for trial, and jury selection process commenced in Berks County.

The docket entries will establish that many days between September 12, 1980 and January 5, 1981 were utilized for other judicial activities involving

the Defendant. These must be excluded from the 120-day period after the mistrial of September 12, 1980 because the Defendant was unavailable for trial. Irrespective of these excludable days, this case was called for trial within the 120 days prescribed by Rule 1100.

This case and the other cases involving the Defendant totally dominated the Westmoreland County Court Calendar for approximately two years. The Defendant's right to a speedy trial has not been violated. This case was brought to trial within the time limits prescribed by Rule 1100.

To obtain a proper perspective of Commonwealth's diligence in prosecuting Defendant in the above-captioned case, one must understand that the Defendant and Michael Travaglia were charged with committing four murders and several robberies. These crimes were committed

between December 27, 1979 and January 3, 1980. These cases totally dominated the judicial proceedings in Westmoreland County. A review of some of the procedural events relating to these cases will definitely establish Commonwealth's diligence in concluding these cases. It is also to be noted that one of the murders, namely that of William Nichols, occurred, and was handled, in Indiana County, Pennsylvania. The other three murders occurred, and were handled, in Westmoreland County. The important procedural events occurring between the Defendant's arrest and the conclusion of the trial in the above-captioned case are as follows:

January 3, 1980:	Defendant arrested with co-actor, Travaglia. Committed to Westmoreland County Detention Center

January 4, 1980:	Complaint filed in the Miller homicide
January 10, 1980:	Magistrate's hearing on other homicide charges continued so as to allow the appointment of counsel for Lesko. (Public Defender's Office could not represent him because of conflict in representing co-defendant, Travaglia.)
January 15, 1980:	President Judge Keim appoints Rabe F. Marsh, Esq., counsel for Lesko.
January 21, 1980:	Counsel appointed for defendant in Indiana County because of conflict with Indiana County Public Defender representing co-actor, Travaglia
January 22, 1980:	Hearing before Judge Keim on Defendant's motion to close Magistrate's hearing to public. Motion denied.
January 22 to 24, 1980:	Magistrate's Preliminary Hearing on all three homicide cases

January 22 to 24, 1980: (continued)	and several robbery charges.
January 28, 1980:	Hearing in Indiana County on Defendant's pre-trial motions
January 30, 1980:	At Defendant's request, Court appoints a psychiatrist to examine him
February 5, 1980:	Defendant transported to Indiana County for hearing before Magistrate
February 8, 1980:	Defendant arraigned before Judge Mihalich; pleads not guilty
February 14, 1980:	Defendant arraigned in Indiana County on Nichols homicide; pleads not guilty
February 19, 1980:	Defendant transported to Pittsburgh for psychological testing
February 26, 1980:	Preliminary Attorney's Conference held in Westmoreland County pursuant to local rules
March 10, 1980:	Defendant's motion granted allowing him thirty more days to file omnibus pretrial motions

March 25, 1980:	Defendant granted leave to retain another psychiatrist to aid in defense
April 9, 1980:	Omnibus pre-trial motion, including change of venue motion filed. Notice of insanity defense filed
April 11, 1980:	Motion for closed suppression hearing filed
April 14, 1980:	Hearing held before President Judge Keim on motion to close suppression hearing, to quash informations, to change venue, and Commonwealth's petition to consolidate case with that of co-actor, Travaglia. Hearing continued for additional information and to await ruling of Supreme Court in Hayes case, regarding closure of suppression hearing.
April 24, 1980:	Pre-trial hearing in Indiana County on Nichols homicide
April 28, 1980:	Continuation of suppression hearing in Indiana County

May 12 to 13, 1980:	Continuation of April 14, 1980 hearing before Judge Keim; additional testimony taken on defendants' motions. Court requested briefs within five days
May 19, 1980:	Defendant pleads guilty to homicide charge in Indiana County after jury selected
May 30, 1980:	President Judge Keim issues opinion and order denying motion to quash information, denying motion for severance, denying motion for change of venue and denying motion to close suppression hearing to public; granted Commonwealth's petition to consolidate charges
May 30, 1980:	Pre-trial conference set by Judge Mihalich in Miller homicide cases
June 2 to 3, 1980:	Miller homicide case called for trial before Judge Mihalich; mistrial granted because of prejudicial pre-trial publicity

June 3, 1980:	Request made by Judge Mihalich of Supreme Court for order changing venire to another county in Miller homicide case
June 11, 1980:	Hearing on Commonwealth's motion to extend Rule 1100 before Judge Ackerman; motion granted and trial date set for no later than September 19, 1980
June 23, 1980:	Order of Supreme Court naming Dauphin County as place of jury selection in Miller homicide case
June 26, 1980:	Motion filed by Defendant at No. 681 C 1980 in opposition to proceeding in August, 1980 because of unavailability of expert witnesses; motion indicates that Judge Mihalich was contemplating commencement of Miller homicide trial in August
June 30, 1980:	Rehearing of Commonwealth's petition to extend time before Judge Ackerman; time to extended to September 8, 1980

July 18, 1980:	Judge Mihalich, presiding over Miller homicide case, files order setting September 3, 1980 as date for commencement of that trial in Dauphin County after consultation with President Judge in Dauphin County regarding logistics and time needed for calling jurors
August 29, 1980:	Hearing before Judge Ackerman on Commonwealth's motion to extend Rule 1100; granted to October 6, 1980
September 3, 1980:	Jury selection begins in Dauphin County in Miller homicide case
September 3 thru September 12, 1980:	Jury selection continues in Dauphin County in Miller homicide case
September 12, 1980:	Defense motion for mistrial granted in Dauphin County in Miller homicide case when jurors learned that defendants were charged with other homicides

September 16, 1980:	Judge Mihalich requests Supreme Court to designate another county for jury selection in Miller homicide case
September 18 thru September 30, 1980:	Suppression hearing before Judge Ackerman in all three homicide cases (Miller, Levato and Newcomer) and allied robbery cases
September 19, 1980:	Levato homicide case assigned to Judge Loughran; Newcomer case assigned to Judge Hudock
September 30, 1980:	Defense counsel requests delay in suppression hearing so as to allow introduction of more evidence
October 3, 1980:	Judge Ackerman issues order on suppression motions
October 3, 1980:	Joint hearing on Commonwealth's petition to extend Rule 1100 held before Judges Loughran and Hudock; extension granted in Newcomer case by Judge Hudock until November 10, 1980

October 3, 1980:	At joint hearing, Defendants renewed request for change of venue in Levato and Newcomer homicide cases; motions granted by Judge Hudock and Judge Loughran
October 3, 1980:	Request made of Supreme Court to designate county of jury selection in Levato and Newcomer homicide cases by Judges Hudock and Loughran
October 9, 1980:	Supreme Court designates Berks County as place of jury selection in Miller Homicide case
October 22, 1980:	Orders received from Supreme Court by Judges Hudock and Loughran designating Montgomery County as the place of jury selection in the Levato homicide case and Delaware County as place of jury selection in Newcomer homicide case
October 31, 1980:	Defendants Lesko and Travaglia, in joint hearing before Judge Loughran and Hudock,

October 31, 1980: (continued)	agree to waive Rule 1100 from that date until March 2, 1981 so as to allow the trial of Miller homicide case to proceed
January 5 thru February 3, 1981:	Trial of Miller homicide case; Defendants Lesko and Travaglia tried jointly and sentenced to death by jury.

For the above-mentioned reasons, the Defendant's Motion in Arrest of Judgment is denied.

* * * * *

In accordance with the foregoing Opinion, the Court issues the Order dated and filed of even date herewith.

Dated: April 5, 1982

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

No. 681 C 1980

BEFORE: Gilfert M. Mihalich, J.
Joseph A. Hudock, J.
Daniel J. Ackerman, J.

COURT EN BANC

ORDER OF COURT

AND NOW, to wit, this 5th day of April, 1982, in accordance with the Opinion dated and filed of even date herewith, it is hereby ORDERED, ADJUDGED and DECREED that the Motion for New Trial and Motion in Arrest of Judgment filed by the Defendant, John Charles Lesko, are denied.

It is further directed that Defendant, John Charles Lesko, appear before

Judge Gilfert M. Mihalich for sentencing on Friday, the 23rd day of April, 1982 at 1:00 o'clock P.M.

BY THE COURT:

/s/ Gilfert M. Mihalich, J.
Gilfert M. Mihalich, Judge

CONCURRING:

/s/ Joseph A. Hudock, J.
Joseph A. Hudock, Judge

_____
Daniel J. Ackerman, Judge

(See Dissenting Opinion attached to this Court's Opinion)

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

No. 681 C 1980

OPINION

ACKERMAN, J., dissenting:

I respectfully dissent. Every conceivable effort was made by the trial court to insure that the jurors chosen in this case would come to the jury box without knowledge of the defendant's other bloody deeds. To insure such an impartial jury the court granted two mistrials during the jury selection process and went three-fourths of the way across the state to gather a jury from veniremen unaware that the defendant had

pled guilty to one murder and was charged with two others.

The Commonwealth's principal witness at trial was Ricky Rutherford who was in the car with Lesko and his co-defendant Travaglia when the crime took place, and observed Travaglia fire the fatal shots into Officer Miller. Prior to Rutherford's testimony, the Commonwealth advised defense counsel and the court that it intended to question Rutherford concerning the murder of William Nichols in Indiana County, a crime also committed by Lesko and Travaglia and observed by Rutherford several hours prior to the Miller homicide. The defendant's counsel objected to the introduction of evidence concerning the prior crime. The rule precluding the introduction of evidence of crimes other than those on which the defendant stands presently accused, and the legitimate exceptions to

this rule are well documented.

> "[3] The general rule is that the Commonwealth may not introduce evidence of a crime that is distinct from the crime for which the defendant is being tried. Commonwealth v. Fuller, 479 Pa. 353, 388 A.2d 693 (1978); Commonwealth v. Terry, 462 Pa. 595, 342 A.2d 92 (1975); Commonwealth v. Groce, 452 Pa. 15, 303 A.2d 917 (1973); Commonwealth v. Peterson, 453 Pa. 187, 307 A.2d 264 (1973) (plurality opinion); Commonwealth v. Wable, 382 Pa. 80, 114 A.2d 334 (1955); Commonwealth v. Bastone, 262 Pa.Super. 590, 396 A.2d 1327 (1979); Commonwealth v. Bond, 261 Pa.Super. 311, 396 A.2d 414 (1978). This rule is an application of the principle that prohibits the initial introduction by the prosecutor of evidence of bad character.
>
> > '[C]haracter is never an issue in a criminal prosecution unless the defendant chooses to make it one (Wigmore, evidence, vol. 1, Sections 55, 192). In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar....The principle...is one, not of logic, but of policy (Wigmore, vol. 1, Sections 57, 194; People v.

Richardson, 222 N.Y. 103, 109, 110, 118 N.E. 514). There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of a milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. 'The natural and inevitable tendency of the tribunalwhether judge or jury-is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.' (Wigmore Evi- dence, vol. 1, Section 194, and cases cited). People v. Zackowitz, 254 N.Y. 192, 197, 172 N.E. 466, 468 (1939) (CARDOZO, J.)

'[4] It is often said that there are exceptions to this general rule, and that evidence of a distinct crime may be admitted when it tends to prove

> (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other than proof of one tends to prove the others; or (5) to establish the identity of the persons charged with commission of the crime on trial - in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. Commonwealth v. Peterson, supra, 453 Pa. at 197-98, 307 A.2d at 269." Commonwealth v. Rozanski, Pa.Super. 433 A.2d 1382, 1386 (1981).

The fact that the defendant had recently committed a homicide in Indiana County and had stolen the victim's car was admissible to negate the claim of the co-defendant Travaglia that the shooting of Officer Miller was acci-

dental.[1]

If the examination of Rutherford had been left to a recitation that he and the defendants were in a stolen car and that the defendants had participated in a homicide in an adjoining county hours

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[1]I do not agree that the facts support the conclusion that the Miller homicide was part of the same transaction as the Nichols' homicide. In Commonwealth v. Brown, Pa. 342 A.2d 84 (1981) relied on by the majority, the jury was permitted to hear that the defendant after committing a robbery escaped apprehension by entering a house and taking as hostages the occupants who became the victims of robbery, rape and murder. The majority concludes that Officer Miller was killed while the defendants were leaving the scene of the Nichols' murder. The majority, I believe, would agree that the defendants, after murdering Mr. Nichols, drove around for a while, went to Travaglia's father's home and stole a gun; left, returned to steal the correct ammunition, and drive to Apollo intending to rob a store (see majority opinion, p. 64). Seeing Officer Miller parked in his patrol car, they drove by him three times speeding and honking their horn finally luring him into fatal pursuit (volume 1, 368-374). The homicides seem to me to be separate and distinct acts of random violence.

before, I would have no difficulty in concurring with my colleagues on the court en banc. Before Rutherford's testimony began, however, the defendant's counsel made a motion in limine asking the court to limit the witness' testimony to the fact that the car was stolen and its owner killed without recitation of the "lurid details" (volume 1, 320-320). The motion was denied, and it is at this juncture that my opinion parts company with that of my learned colleagues. As indicated above, evidence of other crimes may be admissible for certain purposes; but only if the probative worth of this evidence outweighs the tendency to prejudice the jury. Commonwealth v. Morris, Pa. 425 A.2d 715, 720 (1981). Quoting McCormick on Evidence, Section 190 at 453-55 (2d ed. E. Cleary 1972),

the Superior Court stated recently:

> "some of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholing but one of balancing....
>
> '[Thus the trial judge should] exclude the other-crimes evidence, even where it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial." Commonwealth v. Rozanski, supra, at 386-7.

After reading Rutherford's testimony before the jury, I am constrained to conclude that its prejudicial impact outweighed its probative evidentiary value. The horrible events pertaining to the Nichols' murder laid before the jury can be summarized as follows.

On the evening of January 2nd, 1980, Michael Travaglia abducted William Nichols, a complete stranger, from the

Edison Hotel bar and in the company of Rutherford and Lesko, forced Mr. Nichols to drive them out of the city of Pittsburgh in Nichols' car. Upon entering the car and before leaving the city Travaglia produced a gun and shot Mr. Nichols in the arm (volume 1, 351). The desperate Nichols kept pleading "what are you going to do to me?" (volume 1, 354). After traveling some distance, he was then handcuffed and placed in the back seat of the automobile and as they drove on, the defendant repeatedly punched the wounded and bound man in the face with his fists, taunting him with a knife, calling him a "queer" and asking him if he wanted to perform deviate sexual acts (volume 1, 356). The driver, now Travaglia, would on occasion slow down the car and turn around and punch the victim in the back seat Rutherford continued to describe Mr.

Nichols' torment. "Well, we drove around for a while, and John was hitting the man, and the jury would ask him to stop, and he wouldn't stop. And he would tell the man to talk with a deeper voice, because at the time his voice was high pitched. And then when the would try, he'd laugh and hit him again." (volume 1, 357). The victim eventually slipped into unconsciousness. His scarf was cut in half with part of it stuffed into his mouth and part tied around his head as a gag (volume 1, 358). The car by then had been stopped in a wooded area by a frozen lake. The victim's personal belongings were put into the glove compartment and he is hauled out of the car still handcuffed and his feet were bound with a belt (volume 1, 360). After locating a rock to use as a weight (volume 1, 359), the defendants dragged Mr. Nichols across the edge of the

frozen lake to a hole that they had broken in the ice (volume 1, 364). While Rutherford did not see Nichols entering the water, as they drove from the scene, Travaglia tersely commented on Mr. Nichols fate, "he came back up one time, and was coughing, and went back down under," he said (volume 1, 367).

All homicides are grim and juries are entailed to know all of the relevant facts pertaining to the particular case that they are sworn to hear, but to expect jurors or anyone else to consume the loathsome scenario described above pertaining to a completely different crime without feeling revulsion, passion and hatred for the perpetrators because of it, is contrary to my view of human nature. In addition, armed with the confessions of the defendants and an eye witness to the Miller homicide, it would

seem to have been unnecessary.[2]

The details of how Mr. Nichols was shot, kidnapped, robbed and tortured before he was thrown alive into a frozen lake would, in my opinion, cause a bias in the most devoted juror and standing alone would negate the presumption of innocence. The defendants, no matter how monstrous, had a right to be tried by a jury unmoved by the details of another separate ghastly crime. Accord-

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[2]As indicated, the evidence of the Nichols' homicide negates the co-defendant's theory of accident, but a theory that was also clearly negated by the uncontroverted fact that the officer was shot twice. See Commonwealth v. Wright, Pa.Super. 393 A.2d 833, 836 (1978), which states that courts must balance on one side the actual need for other-crimes evidence in light of the issues and the other evidence available to the prosecution.

ingly, I would reluctantly grant the defendant's motion for a new trial.

s/ Daniel J. Ackerman
Daniel J. Ackerman, Judge